

SECTION 504 AFTER THE ADA AMENDMENTS ACT

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A note about these materials: These materials are not intended as a comprehensive review of all case law, rules and regulations on Section 504 eligibility, but as an overview of the issues involved as schools adapt their Section 504 processes to comply with the ADAAA. These materials are not intended as legal advice, and should not be so construed. State law, local policy, and unique facts make a dramatic difference in analyzing any situation or question. Please consult a licensed attorney for legal advice regarding a particular situation. References to the U.S. Department of Education will read “ED.”

In addition to the Section 504 regulations and OCR Letters of Finding, these materials will also cite guidance from two important OCR documents. First, a Revised Q&A document has been posted on the OCR website since March of 2009 addressing some of the ADAAA changes. This document, *Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities* (March 27, 2009, last modified March 17, 2011), is available on the OCR website at www.ed.gov/about/offices/list/ocr/504faq.html and is referenced herein as “Revised Q&A.”

In January, OCR released a long-awaited guidance document on the ADAAA and its impact on Section 504. The “Dear Colleague Letter” consisted of a short cover letter and a lengthy new question and answer document. *Dear Colleague Letter*, 112 LRP 3621 (OCR 2012)(hereinafter “2012 DCL”).

Learning Objectives:

1. Understand the purpose of the ADA Amendments Act of 2008.
2. Recognize the unique requirements of the Section 504 K-12 regulations with respect to evaluation and FAPE, and how the ADAAA requires changes to school’s Section 504 thinking and processes.

I. A little back-story on the Americans with Disabilities Act Amendments Act of 2008 (ADAAA)

From time to time, Congress revisits legislation to ensure that it has achieved the intended result. Upon review of the Americans with Disabilities Act (ADA), Congress determined that rather than providing a mechanism to make the workplace more accessible one lawsuit at a time, the ADA had become bogged down in disputes over eligibility. Faced with employee challenges to workplace rules and requests for sometimes expensive or inconvenient accommodations, employers had taken to attacks on eligibility. As long as the employee was not eligible, the lawsuit would die and the employer would not be called upon to provide accommodation. The courts, faced with this defensive strategy by employers, focused more on eligibility, and created new barriers to employees seeking the ADA’s protection. Congress amended the ADA to change this unhealthy litigation dynamic.

A. What prompted Congress to make the changes? Eligibility rather than accommodation had become the focus.

The findings and purposes section of the ADAAA clearly articulates Congress’ rejection of the reasoning used by the U.S. Supreme Court in various important ADA cases including *Sutton v. United Air Lines Inc.*, 30 IDELR 681, 527 U.S. 471 (1999) (and its companion cases addressing the effect of mitigating measures on ADA eligibility) and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 102 LRP 6137, 534 U.S. 184 (2002) (denying ADA eligibility when the activity substantially limited is

a narrow one, as opposed to one normally required in the daily life of most people). From the preamble statements included in the ADAAA, it is clear that Congress believed that the Supreme Court's recent interpretations of the eligibility provisions of the ADA had been overly stringent. Indeed, the Court's position that ADA eligibility provisions set up a "demanding" standard for eligibility meant that employees with a variety of impairments would be unable to access the federal courts to raise claims that an employer failed to provide reasonable accommodations that would enable them to perform the essential functions of their jobs.

Disagreement with the *Sutton* rationale. The problem, as outlined in the ADAAA, arises from two types of cases. In one, a person has a bona fide physical or mental impairment, but takes appropriate and effective measures to treat, or mitigate, the impact of the impairment on his daily life. In the *Sutton* line of cases, the Court held that when determining eligibility, one must take into account the effect of these mitigating measures. Thus, if the mitigating measures are effectively addressing the impairment to the point that it does not pose a substantial limitation on a major life activity, then there is no eligibility under the ADA, and the person cannot maintain a legal action claiming an employer's failure to make reasonable accommodations or otherwise asserting discrimination on the basis of disability. *Sutton* addressed the problem of mitigating measures in the context of eyeglasses and contact lenses. *Murphy v. United Parcel Service Inc.*, 30 IDELR 694, 527 U.S. 516 (1999), applied the *Sutton* mitigation rule to medication, requiring that side effects of currently used medication be considered as well. The third case in the trilogy, *Albertsons, Inc. v. Kirkingburg*, 30 IDELR 697, 527 U.S. 555 (1999), applied the *Sutton* mitigation rule to compensatory skills.

Disagreement with the *Toyota* limitation. In the second type of case, a person has a physical or mental impairment, and it does substantially limit a certain activity required in the workplace, but the activity limited is a narrow one not normally required in the daily life of most people. Thus, in the *Toyota* case, the Supreme Court held that since the plaintiff's impairment affected only her ability to perform certain manual tasks required only for unique aspects of automotive manufacturing jobs, she was not substantially limited in a "major life activity." The Court noted, by example, that the plaintiff was able to perform manual tasks normally required in daily life, such as cleaning, doing laundry, going shopping, etc.

With those concerns guiding the effort, Congress amended the ADA making a variety of changes to impact eligibility and restore the necessary dynamic to improve workplace accessibility. The various changes are discussed below in more detail.

B. Was there a problem with K-12 Section 504 eligibility for FAPE?

Congress made no findings with respect to the public schools' duties to students under Section 504 or the ADA. Instead, Congress was focused on changes to the ADA in the context of employment relationships, specifically with respect to eligibility for reasonable accommodations and access to federal courts. Congress did not directly address or reference the ED's regulations with respect to student identification, eligibility, and FAPE in Section 504, and as OCR has indicated, Congress did not direct ED to change the Section 504 regulations. (*Introductory paragraph of the Revised Q&A.*)

Regardless, the ADAAA changes apply to Section 504. The conforming amendments to the ADAAA apply the rules of construction as well as the definitional changes to the Rehabilitation Act of 1973, 29 USC §705, which creates the definition of disability used in 29 USC §794(a), the statutory provision upon which the ED's K-12 Section 504 regulations are premised. Consequently, the ADAAA changes made by Congress to address problems encountered by employees attempting to secure reasonable accommodation through the courts also apply to FAPE eligibility for students in the public schools. ED indicates that its regulations "as currently written are valid and OCR is enforcing them consistent with the Amendments Act." (*Introductory paragraph of the Revised Q&A.*)

Problems arise from the differences between the employment world for which the changes were drafted and the K-12 Section 504 world where the changes are also applied. In the employment

world, employers do not hire every applicant, do not exist for the benefit of the employees (but instead for the benefit of shareholders or owners) and seek to turn a profit. Consequently, for the ADA to be successful, it must somehow address the profit motive behind an employer's reluctance to hire an employee with a disability or to effect accommodations for an employee with a disability. The ADA accomplishes that goal by providing a mechanism for employees to sue reluctant employers to make reasonable accommodations and, by means of the ADAAA, greatly reducing the employee's task in proving ADA eligibility.

The K-12 public education world is quite different. No public school runs at a profit, nor are public schools generally allowed to pick and choose whom they educate. Public schools exist for the sole purpose of educating students. Built into the public school-student dynamic (and spurred by concerns for AYP) is a growing emphasis on individualized instruction and personalized attention when, due to disability or other factors, a student is not successful. Further different is that in the K-12 Section 504 world, the public school has a duty to identify and evaluate potentially eligible students and provide those eligible students with a free appropriate public education. Unlike the workplace, where employees request accommodation, K-12 public schools have an affirmative duty to look, find and accommodate or serve. Consequently, when Congress made it easier for employees to demonstrate their eligibility for reasonable accommodation, it also made it easier for K-12 students to qualify for FAPE (a higher level of services than reasonable accommodation) despite the absence of a finding that public schools were denying services to students believed by Congress to be eligible. Arising from these incongruities are questions and concerns about long-standing Section 504 doctrines and practices that arise from the ED's regulations and FAPE requirement.

C. The language of §504 eligibility remains the same, but the interpretation is different.

To be eligible under Section 504, a student must be both "qualified" (the student is within the age range in which services are provided to disabled and nondisabled students under state law, *See 34 CFR §104.3(l)(2)*), and "handicapped." Pursuant to 34 CFR §104.3(j)(1), "Handicapped persons means any person who

- (i) has a physical or mental impairment which substantially limits one or more major life activities;
- (ii) has a record of such an impairment; or
- (iii) is regarded as having such an impairment."

While the ADAAA changed eligibility, it did not change the language of the three prongs. Instead, Congress added new meaning to various pieces of the existing language and some new approaches when applying the language of eligibility. "The Amendments Act does not alter these three elements of the definition of disability in the ADA and Section 504. But it significantly changes how the term 'disability' is to be interpreted." 2012 DCL, p. 4.

These materials will provide some analysis of the ADAA changes and OCR guidance issued to date, together with thoughts and tips to schools on how to respond. Of course, these thoughts and strategies are subject to change should additional guidance be issued. Consider these thoughts and strategies as "talking points" to discuss with your attorney prior to making any significant changes.

II. A Summary of the Five Major Changes to Section 504 Eligibility resulting from the ADAAA

A. Change #1: Construe Eligibility Language in Favor of Broad Coverage

Following its criticism of the Supreme Court cases and the federal Equal Employment Opportunity Commission's (EEOC's) definition of substantial limitation (discussed below), Congress writes, "It is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand

extensive analysis.” ADA Amendments Act of 2008, Section 2(b)(5)(2008). In short, Congress appears to want courts looking less at eligibility and focusing more intently on whether reasonable accommodations are provided by covered entities. To that end, Congress provides as part of its rules of construction that, **“The definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act.”** OCR provided this additional explanation. “The Amendments Act does not alter the school district’s substantive obligations under Section 504 and Title II. Rather... it amends the ADA and Section 504 to broaden the potential class of persons with disabilities protected by the statutes.” 2012 DCL, p. 4.

A little commentary: In light of this provision, it seems that in cases where the eligibility question could go either way, Congress would have the Section 504 committee determine the student eligible.

B. Change #2: Expansion of Major Life Activities (Including Major Bodily Functions)

Prior to the ADAAA, schools were accustomed to looking at a rather short list of major life activities during the Section 504 evaluation. **The Section 504 regulations initially listed major life activities such as “caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.”** 34 CFR §104.3(j)(2)(ii). The list of major life activities was not exhaustive; that is, there was an understanding that other major life activities could be added to the list. As part of its effort to reduce the time spent on proving eligibility prior to proceeding to the accommodation question, Congress expanded the list of major life activities in the ADAAA and included major bodily functions as well.

Pursuant to the ADAAA, **major life activities now also include eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, and communicating.** 42 U.S.C. §12102(2)(A). The list is not exhaustive, and other major life activities are possible such as “interacting with others” (a major life activity adopted by the EEOC, but curiously, not recognized by Congress).

And major bodily functions... In the definition section of the ADAAA, Congress provided that “a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.” 42 U.S.C. §12102(2)(B). One of the problems encountered in eligibility is pinning down the major life activity impacted by the impairment. To ease the burden and make the analysis more eligibility-friendly, major bodily functions are helpful. Note that for some impairments, like diabetes, the addition of major bodily functions (specifically here, the endocrine function) makes tying the impairment to a life activity very simple.

C. Change #3: Impairments that Are Episodic or in Remission

The ADAAA declares: **“An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.”** While the language covers two different types of impairments with similar treatment, the author will analyze these impairments separately as there are significant differences between the two.

Episodic impairments. Schools have experience with students whose physical or mental impairments ebb and flow in their severity. Conditions such as seasonal allergies or asthma, migraines and cystic fibrosis are good examples of impairments that may be substantially limiting at times (in hot weather, when the student is stressed, when irritants or trigger factors are present), and have little impact at other times. Schools commonly qualify students under Section 504 if their condition while not constant, episodically rises to the level of substantial limitation on a major life activity. Congress’ concern seems to be that accommodations are not denied simply because the disability, at the moment of evaluation, is not substantially limiting, when we know from experience that substantial limitation will recur. Section 504 committees should look carefully at data over a range of time (as opposed to a snapshot). For

example, the student whose heat-induced asthma is not affecting him at the time of Section 504 evaluation in January may have experienced significant troubles as the school year started in August and September, and when the previous school year ended in April and May. The timing of the evaluation should not function to preclude eligibility for students whose impairments are episodic and are not conveniently substantially limited at the time of evaluation.

Episodic Section 504 plans? An interesting result of the realization in law that a qualifying impairment need not rise to the level of substantial limitation every day is the corresponding logical conclusion that perhaps §504 plans need not provide constant services. If the impairment can be episodic, could the plan be episodic as well? As a practical matter, the nature of the impairment likely will dictate whether such a plan is possible. After all, the Section 504 committee would need to be able to articulate what factors trigger the plan's provisions, and likewise, what factors (or the absence of factors) trigger the plan to turn off. The triggers would need to be fairly simple and as subject to objective verification as possible. For example, a student with heat-induced asthma who needs assistance when the temperature rises above 90 degrees could have a plan triggered by temperature. When the thermometer hits 90 degrees, the plan is on, otherwise, the student does not require services. Most students likely will not have such simple and objective triggers, making episodic plans difficult to implement. In those cases where the committee cannot articulate a simple objective trigger for the plan to turn on and off, the plan would simply be left in place all the time. *Note that OCR has not expressly addressed episodic plans in any published writing to date. Talk with your school attorney about the idea before attempting to implement it.*

Impairments “in remission.” Under the ADAAA, an impairment “in remission is a disability if it would substantially limit a major life activity when active.” Note that instead of the episodic situation (where an impairment may from time to time reach substantial limitation), this provision applies to an impairment that was once active, and could return (such as cancer, hepatitis, etc). This rule grants to some inactive impairments the same status that applies to active ones—assuming that the impairment in remission was substantially limiting when it was active.

D. Change #4: Determining Substantial Limitation under a New Mitigating Measures Rule

Congress rejected the mitigating measures rule imposed by the Supreme Court in the *Sutton* trilogy. In the ADAAA, Congress replaces *Sutton, et. al.*, with a rule prohibiting the consideration of the effects of remediation efforts when determining whether a disability substantially limits a major life activity (with the exception of ordinary eyeglasses and contact lenses).

The ADA Amendments provide at 42 USC §12102(4)(E):

“The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as —

- (I) medication, medical supplies, equipment, or appliances, low-vision devices (which do not include ordinary eyeglasses or contact lenses), prosthetics including limbs and devices, hearing aids and cochlear implants or other implantable hearing devices, mobility devices, or oxygen therapy equipment and supplies;
- (II) use of assistive technology;
- (III) reasonable accommodations or auxiliary aids or services; or
- (IV) learned behavioral or adaptive neurological modifications.”

This part of the amendments clearly means to reverse the reasoning of the *Sutton* line of cases, where the Supreme Court held that eligibility determinations must take into account the effect of treatment or other mitigating measures utilized by the person with an impairment. Thus, under the Supreme Court's reasoning in *Murphy*, the fact that the truck driver with high blood pressure was being effectively treated with medication had to be taken into account in determining whether he was a person with a disability under Section 504. The Court found that, with treatment, the truck driver was not substantially limited in a major life activity and thus could not maintain a Section 504 lawsuit against

his employer. In the third case of the *Sutton* trilogy, *Kirkingburg*, the Supreme Court determined that a compensatory skill developed and used by an individual with monocular vision was to be treated no differently for eligibility purposes than other mitigating measures. Congress here means to restore the employee's ability to press his claim for accommodation, rather than be dismissed at the "door" of the courthouse because of the use of mitigating measures. Note finally that the new mitigating measures rule has limited application. By its own terms, the rule only applies to the determination of whether the student is substantially limited. It does not apply to the question of whether the student with a disability needs services.

E. Change #5: A Lower Standard for "Substantial Limitation"

In the ADAAA, Congress expresses its "expectation" that the EEOC will change its current regulation defining substantial limitation as "significantly restricted" to something more consistent with the ADA Amendments' efforts to expand the protection of the ADA. *See*, Pub. L. No. 110-325, §2(a)(8) & 2(b)(6). This change impacts many schools that looked to the EEOC definition in the absence of one from the U.S. Department of Education. ED never created a definition of substantial limitation in the Section 504 regulations. Instead, the Commentary to ED's regulations provided this note "Several comments observed the lack of any definition in the proposed regulation of the phrase 'substantially limits.' The Department does not believe that a definition of this term is possible at this time." Appendix A, p. 419. In later guidance, ED concluded that each LEA makes its own determination of substantial limitation. *Letter to McKethan*, 23 IDELR 504 (OCR 1995). While LEAs were not required to follow the EEOC definition, many did, as this was the definition most-frequently used and interpreted by the federal courts. EEOC's definition of substantial limitation, rejected by Congress in the ADAAA, was as follows:

"(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity." 29 CFR §1630.2(j)(1)(i)&(ii).

Congress' concern was not with the comparison of the person evaluated to the average person in the general population, but the *amount of difference required between the two* for substantial limitation to be found. For those school districts following EEOC, a change in the substantial limitation definition is required.

Those are the major ADAAA changes that impact K-12 Section 504. We now turn to what we've learned about the changes since the ADAAA went into effect.

III. So, What Do We Know Now?

A. "Student with a disability" under Section 504 even when no services are required?

Prior to the ADAAA, most school districts operated under the assumption that Section 504 eligibility required (1) a physical or a mental impairment that substantially limits one or more major life activities, and (2) need for accommodations or services. Just as IDEA includes a "needs special education and related services" requirement for eligibility, the assumption was that Section 504 had a similar "needs services" requirement. This thinking logically followed from the regulatory trigger for the school's duty to evaluate under §504—the school has a duty to evaluate when it suspects disability together with the student's need for services. §104.35(a).

Post-ADAAA Section 504 eligibility is not contingent on a student's need for services. At least two OCR decisions in the last few years (and the January 2012 Dear Colleague Letter) highlight a view of Section 504 eligibility not previously recognized by most public schools. In these decisions, OCR has separated the eligibility questions from the question of whether the student needs a Section 504 plan. *See, e.g., Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (“**The procedures also state that a student is not eligible under Section 504 as a student with a disability if the student does not need Section 504 services in order for the student’s educational needs to be met, which conflates the determination of disability with placement and services decisions, which should be separate**”). *See also, Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009)(applying similar analysis to mitigating measures, OCR wrote: “Though the positive impact of accommodations is pertinent in evaluating the effectiveness of those accommodations, their impact should not be conflated with the issue of eligibility”).

A technically eligible student? The “technically eligible” student is one who despite meeting Section 504 eligibility criteria, does not need services from the school. In other words, she has a physical or mental impairment that substantially limits one or more major life activities, but is not in need of a Section 504 Plan. Two types of technically eligible kids are possible following the ADAAA: the student with an impairment in remission (who receives no services because the impairment does not create a need for services), and the student whose needs are met through mitigating measures that he or she controls (so services from the school are not required to meet the student’s needs). OCR provided the following example of the mitigating “type” of technically eligible student.

“For example, suppose a student is diagnosed with severe asthma that is a disability because it substantially limits the major life activity of breathing and the function of the respiratory system. However, based on the evaluation, the student does not need any special education or related service as a result of the disability. This student fully participates in her school’s regular physical education program and in extracurricular sports; she does not need help administering her medicine; and she does not require any modifications to the school’s policies, practices, or procedures. The school district is not obligated to provide the student with any additional services. The student is still a person with a disability, however, and therefore remains protected by the **general nondiscrimination provisions** of Section 504 and Title II.” 2012 DCL, p. 9, Question 11 (emphasis added).

So what does the technically eligible student get from Section 504? The technically eligible student would get no Section 504 Plan because there is no need for services, but what about procedural protections? Prior to the 2012 guidance letter, the author assumed that the technically eligible student would receive manifestation determination, procedural safeguards, periodic reevaluation or more often as needed, as well as the nondiscrimination protections of Section 504. Should need for a §504 plan develop, the Section 504 Committee would reconvene and develop an appropriate §504 services plan at that time. Note, however, that in OCR’s severe asthma example the student receives no services or Section 504 Plan, but remains protected by the “general nondiscrimination provisions” of Section 504 and the ADA. It would be helpful for OCR to identify precisely the rights due a technically eligible student encompassed within that phrase “general nondiscrimination provisions.”

The result of the new ADAAA rules is a “disconnect” between Section 504 eligibility criteria and the Section 504 duty to evaluate. The school’s duty to evaluate under Section 504 is triggered by the school’s suspicion of disability and the student’s need for services. As the 2012 OCR guidance makes clear, “A school district must conduct an evaluation of any individual who because of disability “needs or is believed to need” special education or related services. 2012 DCL, Question 8, p. 7 (citing 34 CFR §104.35(a)).

Where the student is not in need of school services due to mitigating measures under the control of the student (as in OCR’s severe asthma example), there would appear to be no student need for services to trigger the school’s duty to evaluate. Consequently, an evaluation for such a student would likely occur only in response to a parent referral.

Similarly, where the student's impairment is in remission, there will likely be no outward evidence of impairment or current student need for services to trigger the school's duty to evaluate. The plain language of §104.35(a) should mean that the school has no duty to find and evaluate students with an impairment in remission as long as no need for services arises from the dormant impairment. A duty to evaluate could be triggered, of course, by a parent referral.

B. RTI's relationships with IDEA & Section 504 are very different

1. IDEA & RTI

Special education has clearly embraced RTI and early intervention in an effort to solve a variety of problems with respect to eligibility and to restore an appropriate, cooperative, relationship between special education and regular education. At the risk of over-simplification, consider the following elements in the successful relationship between IDEA and RTI/early intervention. First, the relationship arises from a desire to reduce IDEA eligibility caused by over-identification and improper identification by emphasizing the importance of regular education first, and beefing-up the resources and interventions available to struggling students through regular education. Second, IDEA reserves specially designed instruction for IDEA-eligible students who cannot benefit from education unless they have specially designed instruction. Finally, the relationship conditions the rights of IDEA on IDEA-eligibility, making the rights contingent, in part, on the student's need for special education (as opposed to needing the types of services that RTI and early intervention provide). If the student's needs can be met without special education, the student is not eligible for special education.

2. Section 504 & RTI

Unlike its efforts in IDEA (where it was concerned in part with over-identification), Congress made changes in the ADAAA to *increase* eligibility. Those changes apply to Section 504 as well. One of those changes was a new mitigating measures rule, which prohibits the consideration of the ameliorative effects of remediation efforts when determining whether an impairment substantially limits a major life activity. Specifically listed among the mitigating measures to be "filtered out" during the Section 504 Committee's evaluation is "reasonable accommodation." OCR has determined that the phrase "reasonable accommodations" includes things such as accommodations and assistance provided to students through a student services team or early intervention team, *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009); and informal help provided consistently by classroom teachers, *Virginia Beach (VA) City Public Schools*, 54 IDELR 202 (OCR 2009). The inclusion of those two activities would seem to logically include RTI as well.

How does this impact the line between RTI and Section 504 eligibility for students who need support due to impairments? There no longer seems to be a line, at least in OCR's perspective. Consider these two portions of the Revised Q&A.

"31. What is a reasonable justification for referring a student for evaluation for services under Section 504? School districts may always use regular education intervention strategies to assist students with difficulties in schools. Section 504 requires recipient school districts to refer a student for an evaluation for possible special education or modification of regular education if the student, because of disability, needs or is believed to need such services." Revised Q&A, Question 31.

"40. What is the difference between a regular education intervention plan and a Section 504 plan? A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school." Revised Q&A, Question 40.

A little commentary: Interestingly, those two questions and answers are at odds with both the current RTI movement (emphasizing regular education intervention to ensure that students who get into special education are, in fact, disabled, and in need of special education) and older OCR thinking. For example, consider this 1999 case where OCR recognized that the school has the option of trying regular education interventions before Section 504 evaluation.

“Under Section 504, prior to evaluating a student’s need for special education or related services, the district must have reason to believe that the student is having academic, social or behavioral problems that substantially affect the student’s overall performance at school. A district, however, has the option of attempting to address these types of problems through documented school-based intervention and/or modifications, prior to conducting an evaluation. Furthermore, if such interventions and/or modifications are successful, a district is not obligated to evaluate a student for special education or related services.”

Karnes City (TX) Independent School District, 31 IDELR 64 (OCR 1999). A more recent (and post-ADAAA) letter from Missouri comes to a similar result with a mysterious absence of discussion of mitigating measures. In *Fergusson-Florissant R-II (MO) School District*, 56 IDELR 56 (OCR 2010), OCR upheld a school’s determination that a student diagnosed with Asperger’s was not eligible under Section 504 because he was not substantially limited. Interestingly, the letter references a lengthy list of parent demands for accommodations (including an extra set of textbooks at home, daily checking of his planner, extra time on assignments), together with the school’s response that many of the requested items were already provided. The parent complained that the school focused too heavily on the student’s academic success in determining eligibility (the student had a 3.875 average in 7th grade, and carried a 4.0 on a 4-point scale in 8th grade). OCR rejected that allegation due to evidence that the student’s social interactions, standardized test scores, and adaptive behavior were also considered. Missing from the analysis was any mention of the positive impact of the mitigating measures (accommodations already provided the student) on the major life activity. In essence, most of what the parent wanted was already provided informally through regular education. The school does not appear to have done any mitigating measures analysis as part of the Section 504 evaluation (there is no reference to such analysis in the letter) and OCR says nothing of the failure, despite the fact that the student is determined ineligible because of a lack of substantial limitation. It’s a strange letter, but does hearken back to a Karnes City-like approach (but does so without any analysis, and perhaps, without intending to do so).

A final thought...Is Section 504 really a nondiscrimination statute if every student with an impairment who needs interventions must go through Section 504 to get the intervention, even if the help is available to *all students* through a regular education process *without* Section 504? Isn’t there a flavor of discrimination in the notion that the regular education intervention process is not available for a student whose need may arise from a physical or mental impairment? Doesn’t this thinking conflict with the IDEA push for regular education to do more and to get the right students into IDEA? Why are Section 504 rights required to achieve an equality of participation or benefit that the student already enjoys in the absence of rights? ED can help school efforts to improve regular education interventions by providing consistent guidance here.

Bottom line on the Section 504-RTI relationship: Despite the momentum created for RTI and early intervention in the IDEA, OCR seems to have taken a different approach for Section 504.

- Instead of the concern for over-identification and improper identification that was at issue in the IDEA, Congress’ changes to the ADA and Section 504 were motivated by concern that too few folk were eligible and had access to the nondiscrimination protections of the laws. Consequently, efforts to meet the needs of students with physical and mental impairments outside of the Section 504 process will be suspect.

- Due to changes from the ADA Amendments and OCR's concern over denial of rights to eligible students, schools cannot simply take the position that a student with a physical or mental impairment who is successful at school due to RTI or early intervention need not be considered for possible Section 504 eligibility.
- Remember the plain language of Revised Q&A, Question 40 "A regular education intervention plan is appropriate for a student who does not have a disability or is not suspected of having a disability but may be facing challenges in school." Post-ADAAA OCR (with the exception of the Missouri letter) does not appear to recognize the use of RTI or early intervention instead of a Section 504 plan for a student with an impairment, even if the RTI or intervention would meet the student's needs.
- The Section 504 mitigating measures rule is directly in contradiction with the principles of RTI. Under the IDEA, the fact that a student with a disability responds to RTI and is successful results in no special education eligibility as his needs have been met without specially designed instruction. Under §504, the success of RTI or early intervention must be filtered out or ignored when determining whether the student is substantially limited. The Section 504 question is how would the student with a physical or mental impairment perform without the intervention? If he is substantially limited without the intervention, he is Section 504-eligible.
- Under Section 504, OCR is concerned that eligible students have the protection of the rights even when there is no need for services or evidence of discrimination on the basis of disability at school. Hence, a student with cancer in remission can be eligible under Section 504 and receive the nondiscrimination protections even though the student needs no services or accommodations because the disability remains in remission.

C. Correcting a misconception: Section 504 eligibility for students with physical impairments

1. Some districts ignored major life activities other than "learning"

Some of the first Letters of Finding issued by OCR following the implementation of the ADAAA exposed the problem of schools hyper-focusing on the major life activity of learning and ignoring the possibility of Section 504 eligibility due to substantial limitation in any of the other major life activities. A few examples...

Asthma and the major life activity of "learning." In *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009), the school had taken the position that a student could *only* qualify for Section 504 if the student's physical or mental impairment substantially limited the major life activity of learning. The student at issue was asthmatic, and his disability did not impact his learning or education. The student received a medical management plan. The "District advised OCR that, prior to December 2008, it generally had been using medical management plans instead of Section 504 plans for students with disabilities who were not displaying difficulties in academic performance but who needed assistance with medical needs. If the disability was determined not to have an impact on the student's education, the District would determine that the student did not qualify for a Section 504 plan and would instead provide a medical management plan for medical needs."

However, after training on the ADA Amendments... "The District stated that it is now changing how it conducts eligibility determinations to ensure that they are based on whether one or more of a student's major life activities, not just learning, are substantially limited by a mental or physical impairment." To correct its error, the district sent a letter to parents of students on health plans indicating that it would be reviewing each child's situation under the correct standard. Additionally, under a resolution agreement, new Section 504 procedures were to be drafted and published to all parents and students, and training provided to relevant staff on Section 504. The district also agreed to reevaluate any student who was denied eligibility for disability services or terminated from a Section 504 plan during the 2008-09 school year using the correct definition of disability (as opposed to the

school's previous understanding) as required in the Section 504 regulations and the ADA Amendments Act.

Bone cancer and “learning.” In *Union City (MI) Community Schools*, 54 IDELR 131 (OCR 2009), the District refused to provide accommodations for a student with bone cancer in a Section 504 plan because the child's impairment did not impact the major life activity of learning. OCR noted, however, that the impairment periodically affected the student's ability to walk, climb steps, participate in PE, attend field trips, and obtain transportation services. OCR held that the district's use of an unduly restrictive definition of major life activities (excluding consideration of those other than learning) and its failure to evaluate the student in a timely manner denied the student FAPE.

Other physical impairments and “learning.” In *Oxnard (CA) Union High School District*, 55 IDELR 21 (OCR 2009), a Section 504 committee responded to a parent referral and addressed the potential Section 504 eligibility of a student with irritable bowel syndrome (IBS) and another digestive condition. The team noted that the student was making good grades on advanced classes with the help of accommodations provided under a campus student services team (SST) process. Thus, the team determined that the student's condition did not substantially limit his learning, and that he was not eligible under Section 504. OCR found the district in violation of the law, since the team did not address whether the student's IBS substantially limited his major life activity of digestive function. In addition, OCR found that the team failed to consider that the condition caused frequent absences and a declining GPA, when it determined that his condition did not substantially limit his learning. *See also North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009) (school failed to properly consider eligibility of child with peanut allergy when it looked only at the degree the condition affected academic performance).

A little commentary: While these misconceptions of eligibility were uncovered following the ADAAA, OCR had warned as early as 1995 that schools should look at other major life activities as well.

“Students may have a disability that in no way affects their ability to learn, yet they may need extra help of some kind from the system to access learning. For instance, a child may have very severe asthma (affecting the major life activity of breathing) that requires regular medication and regular use of an inhaler at school. Without regular administration of the medication and inhaler, the child cannot remain in school.” *Letter to McKethan*, 23 IDELR 504 (OCR 1995).

OCR provided some additional examples of impairment impacting other major life activities in the 2012 guidance.

- “(1) a student with a visual impairment who cannot read regular print with glasses is substantially limited in the major life activity of seeing;
- (2) a student with an orthopedic impairment who cannot walk is substantially limited in the major life activity of walking; and
- (3) a student with ulcerative colitis is substantially limited in the operation of a major bodily function, the digestive system.” 2012 DCL, p. 6, Question 7.

2. A history of health plans for physical impairments rather than Section 504 Plans

In addition to districts that simply failed to consider the impact of physical impairments on major life activities other than learning, other districts used something akin to tiered intervention thinking, and concluded that Section 504 was not necessary if a health plan could meet the student's needs. For example, in an Indiana case, OCR found that the District's practice of not serving all students with diabetes under Section §504 or IDEA was appropriate, as long as such students had protocols in place to address their medical conditions, and the District included language in future student/parent handbooks that read “Section 504 plans may be developed for those students with a disability whose

parents/guardians are able to provide sufficient medical documentation that indicates that there is a need for such services.” *Hamilton Heights (IN) School Corp.*, 37 IDELR 130 (OCR 2002). This “regular ed health plan makes §504 unnecessary” approach is of course complicated by the ADAAA’s mitigating measures rule.

OCR has determined that health plans and emergency plans are mitigating measures. *North Royalton (OH) City School District*, 52 IDELR 203 (OCR 2009). Prior to the effective date of the ADAAA, North Royalton initially found the student with an anxiety disorder and tree nut allergy ineligible for Section 504 due to the effectiveness of his emergency allergy plan. OCR determined that at no point was the student denied appropriate services. Further, OCR did not dispute the school’s claims that the student never had a reaction to nuts at school, and never visited the health services coordinator due to anxiety or allergy issues. Nevertheless, in November 2008, prior to the ADAAA going into effect, the school reconsidered the eligibility question, and found the student Section 504-eligible under the new rules, with his EAP becoming his §504 plan on Jan. 1, 2009. As the student’s needs had been met throughout, OCR found no violation with respect to the child’s services (so no compensatory education was required) but did conclude that his initial evaluation was inappropriate as it only considered limitations to the major life activity of learning (like the *Memphis* case, previously discussed).

With respect to health plans (or the EAPs here), OCR required the school to apply the ADAAA to future evaluations. **“In doing so, the district will also apply the new ADAAA standards and will not take into account mitigating measures, such as the use of medicine or the provision of related aids and services, such as those provided in EAPs, when determining students’ disability status.”**

A little commentary: “The district also stated, however, that no other student with a food allergy being served under an EAP — approximately 40 District students — has been identified as a student with a disability and provided a Section 504 plan since the ADAAA took effect on January 1, 2009.” **Interestingly, the resolution agreement with OCR did not require the school to review the files of the other students on EAPs to determine whether referral to Section 504 should be made.** Instead, OCR was satisfied with the following: “The district will issue a letter to the parents/guardians of all students in the District who are currently receiving services under Emergency Allergy Plans of the district’s Section 504 procedures and of their right to request an evaluation under Section 504, at no cost to them, if they believe that their child may have a disability because the child’s medical impairment substantially limits one or more major life activities.” *But see also, Isle of Wight County (VA) Public Schools*, 111 LRP 1964 (OCR 2010) (as part of a resolution agreement, the school agrees to review all students on medical/health plans and determine which students need to be referred to Section 504); *Memphis (MI) Community Schools*, 54 IDELR 61 (OCR 2009) (as part of a resolution agreement, the school agrees to reevaluate all students on medical management plans denied 504 eligibility or dismissed from Section 504 during the 2008-09 school year). Note that in both of these cases, the concern was not that students were on health plans but that school policy looked for eligibility only if the impairment impacted education. Note further the absence of language indicating that all students on health plans are Section 504 eligible.

OCR provided the following language on the adequacy of health plans versus Section 504 plans in its 2012 guidance. Note that the question is directed at students served on health plans prior to the ADAAA and whether that status can continue without Section 504 eligibility after the ADAAA.

“Q13: Are the provision and implementation of a health plan developed prior to the Amendments Act sufficient to comply with the FAPE requirements as described in the Section 504 regulation?

A: Not necessarily. Continuing with a health plan may not be sufficient if the student needs or is believed to need special education or related services because of his or her disability. The critical question is whether the school district’s actions meet the evaluation, placement, and procedural

safeguard requirements of the FAPE provisions described in the Section 504 regulation. **For example, before the Amendments Act, a student with a peanut allergy may not have been considered a person with a disability because of the student's use of mitigating measures (e.g., frequent hand washing and bringing a homemade lunch) to minimize the risk of exposure. The student's school may have created and implemented what is often called an 'individual health plan' or 'individualized health care plan' to address such issues as hand and desk washing procedures and epipen use without necessarily providing an evaluation, placement, or due process procedures.** Now, after the Amendments Act, the effect of the epipen or other mitigating measures cannot be considered when the school district assesses whether the student has a disability. Therefore, when determining whether a student with a peanut allergy has a disability, the school district must evaluate whether the peanut allergy would be substantially limiting without considering amelioration by medication or other measures. For many children with peanut allergies, the allergy is likely to substantially limit the major life activities of breathing and respiratory function, and therefore, the child would be considered to have a disability. **If, because of the peanut allergy the student has a disability and needs or is believed to need special education or related services, she has a right to an evaluation, placement, and procedural safeguards.** In this situation, the individual health plan described above would be insufficient if it did not incorporate these requirements as described in the Section 504 regulation.” 2012 DCL, Question 13, p. 9-10 (emphasis added).

A little commentary: If, on the other hand, there is *no* belief that the student needs special education or related services due to her peanut allergy, she has no right to evaluation, placement and the procedural safeguards. Her health plan would be sufficient. *See, for example, Cleveland (MT) Elementary School District No. 14*, 111 LRP 34458 (OCR 2011)(As part of a resolution agreement, the District agrees to draft policies and procedures that “provide each student with the diabetes management services the student needs, consistent with the student's Section 504 plan, individualized education program, or individual health plan.”).

So what to do? The OCR guidance warns schools that a pre-existing health plan does not satisfy the FAPE obligation if the student would be entitled to FAPE upon appropriate evaluation. “As described in the Section 504 regulation, a school district must conduct an evaluation of any student who, because of disability, needs or is believed to need special education or related services, and must do so before taking any action with respect to the initial placement of a person in regular or special education or any significant change of placement.” 2012 DCL, Question 11, p. 8-9.

The question then is which kids on health plans to refer? The safest, most conservative position is to refer and evaluate under Section 504 all students on health plans. Any other approach is subject to some degree of risk and should be discussed with your school attorney prior to proceeding.

Should your district desire a more targeted response, consider developing an approach with your school attorney that includes the following considerations.

(1) A review of OCR Letters of Finding where health plans are at issue reveals the following:

- Not all students with a health plan will need to be referred for Section 504 evaluation. (*See, for example, North Royalton, Isle of Wight County*).
- Students on health plans cannot be categorically excluded from consideration for Section 504 evaluation, even if their health plans appear to allow these students equal participation and benefit in the school's programs and activities (see *Tyler*, below).
- Each student on a health plan should be considered individually to determine whether a referral for Section 504 evaluation is appropriate. Put simply, significant differences exist among health plans, even for students with the same impairment (see factors below).

- The health plan provides evidence of the student's need for services from the school, as well as insight into the impact of disability, giving the school information that can contribute to its thinking on whether the student might be substantially limited by his impairment, and thus needs to be referred.

(2) Where the student needs the school to administer medication to meet a student's educational needs as adequately as the needs of nondisabled students are met, whether as part of a health plan or as a stand-alone service, OCR believes the student is receiving a related service triggering the duty to evaluate under Section 504. 2012 DCL, Question 8, p. 7.

(3) Where the student, in addition to a health plan, receives accommodations or services from the school to address academic, social, emotional, physical or behavioral needs, the student should be evaluated under Section 504 and no additional analysis is necessary.

(4) If the student is only receiving a health plan from the school (and no other services or accommodations), the school should consider the following factors as part of the decision to refer and evaluate the student, together with other factors as determined appropriate by the school:

- The frequency of the required health plan services. (For example, where services are rarely needed during the school year, the student is less likely to require a Section 504 evaluation than when health plan services are required on a daily or weekly basis.)
- The intensity of the required health plan services. (For example, where a student who self-tests and administers medication for diabetes needs access to the nurse for questions or occasional assistance, the student is less likely to require a Section 504 evaluation than a student who relies on the nurse or other school staff for daily testing and medication due to diabetes.)
- The complexity of the required health plan services. (That is, do the services require a complex or systematic approach to integrate or coordinate efforts of staff and others to meet the student's needs? For example, the more a student requires constant monitoring and exchange of information among staff, parents, and doctor to meet his health needs, the more likely he requires a Section 504 evaluation.)
- The health and safety risk to the student if health plan services are not provided or are provided incorrectly. (For example, the greater the risk of serious injury or death to the student from the failure to provide appropriate health plan services, the more likely the student requires a Section 504 evaluation.)
- In analyzing the student's needs with respect to these factors, no one factor is necessarily dispositive in every decision. The weight to be given any factor is to be determined by the school as appropriate in its case-by-case determination pursuant to the regulations.

(5) Where the student is Section 504-eligible (a student with a disability under Section 504) a health plan should be governed by the Section 504 procedural safeguards even if the health plan is separate from the Section 504 Plan and even if no Section 504 Plan of academic accommodations or services is provided (see discussion of *Tyler* case below).

D. To OCR, Section 504 rights matter as much as the services.

OCR's concern with respect to serving potentially Section 504-eligible students through RTI/early intervention or health plans rather than under Section 504 is the lack of procedural compliance and safeguards. *See, for example, Tyler (TX) ISD*, 56 IDELR 24 (OCR 2010) ("In relying on an individualized healthcare plan and not conducting an evaluation pursuant to Section 504, the TISD

circumvents the procedural safeguards set forth in Section 504.”); *Dracut (MA) Public Schools*, 110 LRP 48748 (OCR 2010)(“A significant distinction between serving the Student on a Section 504 Plan which references a Health Plan, versus a health plan alone, is that the Student without the Section 504 Plan does not have any of the procedural protections that he is afforded under Section 504.”). A 2011 letter of finding from Virginia simply declares that when an eligible student has a health plan, he is receiving services under Section 504.

“The Division states there is no reference to a Health Treatment Plan in any part of the June 2009 IEP. There is only a reference of ‘cool temps’ on the testing accommodations sheet and documentation of the ice pack use in a daily log. Because the Division did provide some evidence that it was complying with the Health Treatment Plan in assisting the Student with body temperature regulation, OCR finds there is insufficient evidence of a violation of Section 504. **However, OCR cautions the Division that, where any student with a disability has a health plan in place in order to address the impact of a disability, OCR considers this student to be receiving services under Section 504, whether or not the health plan is formally incorporated into an IEP or Section 504 Plan.** Thus, the student’s health plan is to be developed and implemented according to the requirements of Section 504, and the student and his or her parents are entitled to Section 504’s procedural safeguards with regard to the health plan.” *Prince William County (VA) Public Schools*, 111 LRP 49536 (OCR 2011)(emphasis added).

E. Some impairments will virtually always result in eligibility

Is there such a thing as an impairment that results in ADA/Section 504 eligibility for every person it afflicts? Prior to the ADAAA, both the Supreme Court and OCR concluded that such was not the case. For example, **in 1998, the Supreme Court declined to recognize a disability that would automatically qualify every individual who suffers from it under the ADA.** *Bragdon v. Abbott* involved an individual who was HIV positive and had been charged a higher fee for dental work than non-HIV positive patients. *Bragdon v. Abbott*, 118 S.Ct. 2196 (1998). In determining that she was substantially limited in the major life activity of procreation, the Court recognized that there was a significant risk of her infecting a sexual partner as well as a significant risk of infecting her baby at birth. This decision recognized the case-by case determination required by the ADA. *See also, Albertsons, Inc. v. Kirkingburg*, 119 S.Ct. 2162 (1999)(Supreme Court declined to find in monocular vision a *per se* disability. “[T]he Act requires monocular individuals, like others claiming the Act’s protection, to prove a disability by offering evidence that the extent of the limitation in terms of their own experience, as in loss of depth perception and visual field, is substantial.” *Id.* OCR has also held that the mere existence of a medical diagnosis does not create §504 eligibility. “A physician’s medical diagnosis may be considered as part of the evaluation process. However, a medical diagnosis of an illness does not automatically qualify a student for services under Section 504.” *Vineland (CA) Elementary School District*, 49 IDELR 20 (OCR 2007). That position persisted for a time even after the ADAAA Amendments, as evidenced by this language in the Revised Q&A.

“23. Are there any impairments that automatically mean that a student has a disability under Section 504? No. An impairment in and of itself is not a disability. The impairment must substantially limit one or more major life activities in order to be considered a disability under Section 504.”

The Post-ADAAA Approach. When the Equal Employment Opportunity Commission (EEOC) issued its final regulations implementing the ADAAA (with respect to employees), it took a different position. In light of Congress’ desire that eligibility be viewed more broadly, together with the changes to eligibility (more major life activities, the addition of major bodily functions, a lower hurdle of substantial limitation, a new mitigating measures rule and special treatment for impairments in remission and episodic impairments), EEOC determined that some impairments, while not automatically resulting in eligibility, would virtually always result in eligibility.

“(3) *Predictable assessments*—

(ii) ...Given their inherent nature, these types of impairments will, as a factual matter, virtually always be found to impose a substantial limitation on a major life activity. Therefore, with respect to these types of impairments, the necessary individualized assessment should be particularly simple and straightforward.

(iii) For example, applying the principles set forth in paragraphs (j)(1)(i) through (ix) of this section, it should easily be concluded that the following types of impairments will, at a minimum, substantially limit the major life activities indicated: **Deafness** substantially limits hearing; **blindness** substantially limits seeing; an **intellectual disability** (formerly termed mental retardation) substantially limits brain function; **partially or completely missing limbs or mobility impairments** requiring the use of a wheelchair substantially limit musculoskeletal function; **autism** substantially limits brain function; **cancer** substantially limits normal cell growth; **cerebral palsy** substantially limits brain function; **diabetes** substantially limits endocrine function; **epilepsy** substantially limits neurological function; **Human Immunodeficiency Virus (HIV) infection** substantially limits immune function; **multiple sclerosis** substantially limits neurological function; **muscular dystrophy** substantially limits neurological function; and **major depressive disorder, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia** substantially limit brain function. The types of impairments described in this section may substantially limit additional major life activities not explicitly listed above.” 29 C.F.R. §1630.2(j)(3)(emphasis added).

Although these are final EEOC regulations, they do not have legal authority with respect to K-12 Section 504 students, as the ED retains jurisdiction to issue K-12 rules. (These regulations *do* apply to issues involving school districts and *their employees*). Nevertheless, it appears that ED reviewed EEOC’s position, and adopted it with respect to a small number of impairments. OCR’s January 2012 guidance letter indicates that a handful of impairments will almost always result in eligibility.

“In most cases, application of these rules should quickly shift the inquiry away from the question whether a student has a disability (and thus is protected by the ADA and Section 504), and toward the school district’s actions and obligations to ensure equal educational opportunities. While there are no per se disabilities under Section 504 and Title II, the nature of many impairments is such that, in virtually every case, a determination in favor of disability will be made. Thus, for example, **a school district should not need or require extensive documentation or analysis to determine that a child with diabetes, epilepsy, bipolar disorder, or autism has a disability under Section 504 and Title II.**” 2012 DCL, p. 5 (emphasis added).

A little commentary: The ED position mimics the “virtually always” language of EEOC (ED says “virtually every case”), but lists fewer impairments than EEOC. Schools should be aware of the impairments in EEOC’s lengthier list as individuals with impairments on EEOC’s list, but not OCR’s list, may argue for similar treatment by the schools.

F. Do we know what “substantially limits” means?

Not really, but we do know what substantially limits *does not* mean. In response to Congress’ “expectation,” EEOC produced a final regulation that transforms what was a fairly simple two paragraph definition (reprinted above) into nine paragraphs. As a practical matter, the EEOC’s new definition is likely too unwieldy for use by Section 504 Committees, and need only be adopted for K-12 student evaluations should a school desire to do so. In the revised Q&A, OCR seems to indicate that no definition is forthcoming.

“22. Does OCR endorse a single formula or scale that measures substantial limitation? No. The determination of substantial limitation must be made on a case-by-case basis with respect to each individual student. The Section 504 regulatory provision at 34 C.F.R. 104.35(c) requires that a group

of knowledgeable persons draw upon information from a variety of sources in making this determination.” Revised Q&A, Question 22.

Unless ED creates a definition or endorses a definition, schools will have to adopt a definition of their own. All that is certain from the ADAAA is that the “significant restriction” identified in the now-defunct EEOC definition is too high a requirement—a less demanding definition is required by the Congress.

A little commentary: Until guidance on this issue is provided by ED, consider with your school attorney the following approach. Ask your Section 504 Committees to determine whether there is a substantial limitation, with the knowledge that (1) substantial limitation does not mean “significant restriction” as ordered by Congress, and (2) the appropriate standard is less demanding than “significant restriction.” The Committee is then free to apply its own, less demanding definition, and knows not to use the definition that was rejected by Congress.

G. Can there be substantial limitation despite educational success? Yes, that’s the impact of mitigating measures analysis.

Section 504 mythology in some school districts has included that notion that to be eligible, a student had to be failing academically. That thinking was subject to a variety of OCR complaints over the years, with parents alleging that students either weren’t referred or were not determined eligible unless they were failing. While districts denied taking such a position, not all school employees got the memo. *See, for example, Cleveland County (NC) Schools*, 110 LRP 4643 (OCR 2009)(“It appears that the school did not consider whether the student was substantially limited in a major life activity in determining whether the Student could be eligible to receive services under Section 504. Rather, the school decided that the student was ineligible to receive services under Section 504 simply because he did not earn failing grades (Ds and Fs) in his classes.”)

The ADAAA provides additional clarity on the impact of educational success in the context of the new mitigating measures requirement. OCR explains in a 2009 Letter of Finding.

“When considering the condition, manner or duration in which an individual with a specific disability performs a major life activity, **the evaluation should not assume that an individual who has performed well academically cannot be substantially limited in activities such as teaming, reading, writing, thinking or speaking.** While grades may be a legitimate factor in the range of sources for an evaluation process, grades may not be used as the only source or sole determinative source of a decision that a student is not eligible under Section 504. Achievement based on informal services provided by teachers, such as extra time on exams, extensions of homework deadlines, for example, may be pertinent to evaluation of some types of impairments.” *Sequoia (CA) Union High School District*, 110 LRP 4676 (OCR 2009)(emphasis added).

A more refined approach to Section 504 eligibility for students with learning disabilities. The problem of academic failure as a condition to Section 504 eligibility is especially problematic when evaluating students with learning disabilities, who despite their impairments, nevertheless appear academically successful. In the commentary to its regulations implementing the ADAAA, the Equal Employment Opportunity Commission provides some excellent analysis on how to address eligibility for a person with a learning disability (for example, dyslexia) who despite the disability, experiences educational success. Again, these EEOC regulations and commentary are not binding on the K-12 public schools *with respect to their treatment of students* (the U.S. Department of Education has jurisdiction for rules for students) but the EEOC’s rules are instructive. Cites are to the EEOC commentary to its 2011 ADA regulations, 76 Federal Register, March 25, 2011 [*hereinafter*, “EEOC.”].

1. Successful performance does not rule substantial limitation. “As Congress emphasized in passing the Amendments Act, “[w]hen considering the condition, manner, or duration in which an individual with a specific learning disability performs a major life activity, it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” *EEOC, p. 17012-13*.

“Condition, manner, or duration may also suggest the amount of time or effort an individual has to expend when performing a major life activity because of the effects of an impairment, even if the individual is able to achieve the same or similar result as someone without the impairment. For this reason, the regulations include language which says that the outcome an individual with a disability is able to achieve is not determinative of whether he or she is substantially limited in a major life activity.” *EEOC, p. 17012*.

2. Reading is effortless for most people, but not for folks with dyslexia. “For the majority of the population, the basic mechanics of reading and writing do not pose extraordinary lifelong challenges; rather, recognizing and forming letters and words are effortless, unconscious, automatic processes. Because specific learning disabilities are neurologically-based impairments, the process of reading for an individual with a reading disability (e.g. dyslexia) is word-by-word, and otherwise cumbersome, painful, deliberate and slow—throughout life.” *EEOC, p. 17013*.

3. Time and effort must be considered. “Thus, someone with a learning disability may achieve a high level of academic success, but may nevertheless be substantially limited in the major life activity of learning because of the additional time or effort he or she must spend to read, write, or learn compared to most people in the general population.” *EEOC, p. 17012*.

4. Typical eligibility for individuals with learning disabilities. “Individuals diagnosed with dyslexia or other learning disabilities will typically be substantially limited in performing activities such as learning, reading, and thinking when compared to most people in the general population, particularly when the ameliorative effects of mitigating measures, including therapies, learned behavioral or adaptive neurological modifications, assistive devices (e.g., audio recordings, screen reading devices, voice activated software), studying longer, or receiving more time to take a test, are disregarded as required under the ADA Amendments Act.” *EEOC, p. 17009*.

While the preceding EEOC commentary is directed at the workplace, OCR seems to have accepted the thinking behind the commentary, if not all of EEOC’s language on the subject. OCR provided the following guidance on academic success in the January 2012 Dear Colleague Letter.

“In passing the Amendments Act, the managers of the Senate bill rejected the assumption that an individual with a specific learning disability who performs well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking. Thus, grades alone are an insufficient basis upon which to determine whether a student has a disability. Moreover, they may not be the determinative factor in deciding whether a student with a disability needs special education or related aids or services. **Grades are just one consideration and do not provide information on how much effort or how many outside resources are required for the student to achieve those grades.** Additionally, the Committee on Education and Labor in the House of Representatives cautioned that ‘an individual with an impairment that substantially limits a major life activity should not be penalized when seeking protection under the ADA simply because he or she managed their own adaptive strategies or received informal or undocumented accommodations that have the effect of lessening the deleterious impacts of their disability.’ See H.R. REP. No. 110-730, pt. 1, at 15 (2008).” 2012 DCL, p. 7-8 (footnote omitted, emphasis added).

H. Impact of the impairment outside of school as evidence of substantial limitation?

A pair of recent OCR decisions show a broadening view of where to look for impact on major life

activities. *See for example, Hilliard City (OH) School District*, 110 LRP 67496 (OCR 2010)(resolution agreement requires school to consider “whether any particular physical or mental impairment substantially limits one or more major life activities, *not solely learning or the ability to function in the school setting*” (emphasis added)); *Delaware City (DE) School District*, 110 LRP 66017 (OCR 2010) (resolution agreement requires that school “consider all possible major life activities, including operation of major bodily functions, *and will not restrict consideration to only such activities or behavior as is demonstrated during the school day*” (emphasis added)).

A little commentary: Does this resolution agreement language suggest an OCR position that the impact of the impairment outside of school and in noneducational activities can give rise to Section 504 eligibility at school (that is, a finding that this is a student with a disability?). How does that approach square with the notion that Section 504’s protections prohibit discrimination on the basis of disability by the recipient or with respect to the recipient’s programs and activities?

I. Parental consent requirements despite silence in the regulations

While these consent requirements do not seem tied to the ADAAA, and are not found in the Section 504 regulations, they have appeared in OCR guidance in the last few years. OCR has taken the position that parental consent is required not only for initial evaluation, but also for initial and continued Section 504 placement.

Consent to initial Section 504 placement. Interestingly, the Section 504 regulations are silent on the issue (as they are silent on the consent to evaluation issue). Nevertheless, the Revised Q&A provides the following question and answer, which seem to recognize such a right.

“43. What can a recipient school district do if a parent withholds consent for a student to secure services under Section 504 after a student is determined eligible for services? Section 504 neither prohibits nor requires a school district to initiate a due process hearing to override a parental refusal to consent with respect to the initial provision of special education and related services. Nonetheless, school districts should consider that IDEA no longer permits school districts to initiate a due process hearing to override a parental refusal to consent to the initial provision of services.” Revised Q&A, Question 43.

The question and answer clearly accept, without citation to authority, the idea of a parental right to consent prior to initial Section 504 placement. Further, the answer appears to indicate that when a parent rejects services, the school has no obligation to file for due process to override, and probably shouldn’t even try based on the IDEA prohibition. Note that the parent’s refusal to consent to services would likely create another type of technically eligible student, as OCR does not provide that a refusal to consent means that the student is no longer Section 504 eligible. Discuss how to address this situation with your school attorney.

On a related issue, is there a parent right to revoke consent for Section 504 services once the student has been served? Again, despite the absence of authority in the Section 504 regulation, OCR seems to recognize such a right.

“32. A student is receiving services that the school district maintains are necessary under Section 504 in order to provide the student with an appropriate education. The student’s parent no longer wants the student to receive those services. If the parent wishes to withdraw the student from a Section 504 plan, what can the school district do to ensure continuation of services? The school district may initiate a Section 504 due process hearing to resolve the dispute if the district believes the student needs the services in order to receive an appropriate education.” Revised Q&A, Question 32.

Again, the question and answer clearly accept, without citation to authority, the idea of a parental right to revoke consent for continued Section 504 services. Such a revocation does not appear to change the

student's Section 504 eligibility status, making the student technically eligible after the revocation. In both consent for services situations, the school should carefully consider providing the parent notice of the potential impact of the decision to refuse or withdraw consent for Section 504 services. The school should discuss these consent issues with the school attorney.

IV. Some Thoughts on How to Meld the Section 504 FAPE with the ADAAA

- Watch for additional clarifying guidance or regulatory changes from ED. In the 2012 guidance letter, OCR indicated that while no changes to the Section 504 regulations were required by Congress, "The Department of Justice (DOJ) has stated that it will be working with federal agencies, including the Department, to revise their Section 504 regulations to expressly reflect the changes made by the Amendments Act and to provide guidance on their application. OCR continues to assess whether additional guidance or further publications are needed." 2012 DCL, Question 15, p. 10.
- Add language to Section 504 eligibility forms, manuals and procedures to show your school's understanding of the ADAAA's emphasis on broad eligibility.
- Change Section 504 eligibility forms, manuals and procedures to reflect the newly recognized major life activities and the addition of major bodily functions. Pay special attention to the cases (*North Royalton* and *Memphis*, discussed previously) where schools were found in violation for only looking at impact on the major life activity of learning. While the ADAAA did not change the rule, it seems to have exposed an inappropriate practice in some schools.
- Remove references to the EEOC's definition of substantial limitation from Section 504 eligibility forms, manuals and procedures. Keep an eye on the federal courts for emerging definitions. Consider with your attorney the approach outlined earlier in the materials.
- Recognize the limited options available to the school when a parent requests a Section 504 evaluation. *See, for example, Bryan County (GA) School District*, 53 IDELR 131 (OCR 2009) ("Under Section 504, upon receiving notice of a parent's belief that a child has a disability triggering Section 504 protection, the district should determine whether there is reason to believe that the child, because of a disability, may need special education or related services and thus would need to be evaluated. If the district does not believe that the child needs special education or related services, and thus refuses to evaluate the child, the district must notify parents of their due process rights").
- Make appropriate changes in Section 504 eligibility forms, manuals and procedures to reflect the new requirements for students whose conditions are episodic or in remission.
- Understand that the plain language of the changes requires Section 504 eligibility to be determined without regard to the ameliorative or beneficial impact of mitigating measures. OCR has concluded that those measures include regular education interventions, accommodations (like differentiated instruction) and other assistance (like health plans and emergency response plans). Understand that OCR seems to believe that regular education intervention provided outside of a Section 504 process or plan is not appropriate for students who have a physical or mental impairment and are in need of interventions or accommodation (the Q&A #31 approach discussed above), even though such a conclusion is inconsistent with IDEA's emphasis on regular education as a first tier for all students.
- Recognize the possibility of "technical Section 504 eligibility" but no need for a Section 504 plan. Both the "in remission" and the mitigating measures rule can result in students being found eligible but not in need of a Section 504 plan. Schools will need to create a mechanism to document, track and provide the protections arising from technical eligibility. Discuss with your school attorney what other protections are due the student under Section 504.

- Continue to develop strong systems of early intervention for all struggling students, with the knowledge that the need for services arising from disability may be considered a trigger of the duty to evaluate under Section 504.
- Work closely with your school attorney to ensure Section 504 compliance as you consider appropriate changes to your Section 504 process and ongoing efforts to serve students under Section 504.